(4)

No. 108, Original

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF NEBRASKA,
*Plaintiff*,

v.

STATE OF WYOMING,
*Defendant*.

## MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

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*Defendant.*

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## MOTION TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

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The National Audubon Society hereby moves the Court for leave to intervene in this proceeding on the following grounds:

1. The Court's decision in this proceeding will affect rights to the natural flow of the Platte River, which provides habitats for a number of endangered bird species.

2. The Endangered Species Act, 16 U.S.C. §§ 1531-1543, gives Audubon the right to enforce federal law provisions aimed at protecting these endangered species.

3. Audubon has a direct stake in this proceeding in that its interests recognized by federal law may be adversely affected by the Court's decision.

4. Audubon's interests are not adequately represented by any other party to this proceeding.

WHEREFORE, Audubon prays that the Court allow Audubon to intervene or to participate as litigating amicus curiae in this proceeding.

Respectfully submitted,

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## COMPLAINT IN INTERVENTION

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1. The National Audubon Society, one of the Nation's oldest and largest conservation organizations with a membership in excess of 500,000, is dedicated to the protection of the environment and the conservation of natural resources. It manages numerous wildlife sanctuaries, including the Lillian Annette Rowe Sanctuary on the Platte River in Central Nebraska.

2. This Court's decisions apportioning waters of the North Platte River among Wyoming, Colorado and Nebraska affect the flow of the Platte River in Central Nebraska.

3. A number of endangered bird species, including the Whooping Crane, the Piping Plower and the Least Tern, use the Platte River in Central Nebraska as habitats.

4. The Court's decision in this proceeding implicates a number of requirements under the Endangered Species Act, 16 U.S.C. §§ 1531-1534:

a) It will authorize federal agency action triggering the need to assess whether that action is likely to jeopardize endangered or threatened species, 16 U.S.C. § 1536.

b) It will authorize state apportionments the exercise of which may violate the Act's prohibition on harming or harrassing endangered or threatened species, 16 U.S.C. § 1538.

c) It will alter the bases for the consideration of exemptions from the Act's coverage, 16 U.S.C. § 1536, 1539.

5. The conduct of the parties in the proceeding will itself trigger coverage under the ESA and may involve violations of the ESA.

6. The National Audubon Society has rights to enforce the Endangered Species Act and seek review of federal agency action under the Act, 16 U.S.C. §§ 1536, 1540.

Respectfully submitted,

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No. 108, Original

STATE OF NEBRASKA,

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## BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

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### STATEMENT OF THE CASE

This proceeding involves a continuation of a dispute among Wyoming, Nebraska and Colorado over water rights to the North Platte River. In 1945, this Court issued an opinion providing for an equitable apportionment of the natural flow of the North Platte River, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and entered a decree placing certain restrictions on diversions and storage of water from the North Platte, *Nebraska v. Wyoming*, 325 U.S. 655 (1945). At the same time the Court recognized the need to allow for sufficient flexibility to adjust the decree "to meet . . . new conditions." 325 U.S. at 620. It thus retained jurisdiction in the case to consider requests for modification of the decree or for "further relief." 325 U.S. at 671.[1]

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[1] In 1953, the Court modified the decree at the request of all the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

Regulation of the natural flow of the North Platte River has had significant effects on the character of the North Platte River in central Nebraska. As the flow of the North Platte, a significant tributary of the Platte, has decreased and natural fluctuations in the flow have been reduced, the Platte River channel has lost many of its natural contours. In many places the Platte has gone from a predominantly wide and shallow river with few trees on its shores to a series of narrow and deep channels running by tree-lined shores. Further reductions in the Platte's flow are likely to exaggerate these changes. This potential for additional radical change in the character of the Platte has led to fears about the effects such changes would have on a number of endangered bird species that use the Platte, such as the Whooping Crane, the Least Tern, and the Piping Plover. This potentially affected area of the Platte River is also a critical staging area for approximately eighty percent of the world's population of migrating Sandhill Cranes.

On October 6, 1986, Nebraska filed a motion in this Court seeking leave to enforce the Court's apportionment decree based on allegations that Wyoming is violating or threatens to violate the decree in four ways. Specifically, Nebraska asserts that Wyoming's use of waters from the Greyrocks Reservoir, its construction of two water projects on the North Platte River—the Corn Creek Project and the Deer Creek Project—and its attempted regulation of canals used for the transportation of water to Nebraska are impermissible. While Nebraska contends that it does not seek modification of the decree, it is clear that resolution of the controversy between Wyoming and Nebraska may have profound effects on the natural flow of the Platte. After the United States and Wyoming responded to Nebraska's petition, this Court granted the petition on January 20, 1987, giving defendants 60 days within which to file answers.

## ARGUMENT

Because intervention in cases arising under this Court's original jurisdiction is rarely sought by private parties, the Court has had little opportunity to formulate precise standards governing leave to intervene. Nevertheless, the Court has stated some general principles for determining whether intervention is appropriate. In *Maryland v. Louisiana*, 451 U.S. 725, 746 n.21 (1981), the Court approved of intervention by a number of gas pipeline companies in a case involving the constitutionality of a state tax law, because the companies had a direct stake in the controversy. By contrast, the Court rejected intervention by the City of Philadelphia in a water dispute among New Jersey, New York and Pennsylvania. *New Jersey v. New York*, 345 U.S. 369 (1953). The Court reasoned that "[a]n intervenor whose state is already a party [has] the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. In this case, the Court need not grapple with the question of what minimum showing is necessary to warrant intervention. Audubon has interests that are recognized by federal law and that give it the kind of direct stake in the litigation that this Court has already found merits intervention.

### A. Audubon's Interests in Relation to This Proceeding

The National Audubon Society, which has a long-standing interest in wildlife and particularly in migrating birds and their habitats, believes, based on numerous studies, that further reductions in the natural flow of the North Platte would create significant possibilities of harm to migrating bird populations. Audubon's interest in and understanding of the Platte grow in part out of its ownership and maintenance of the Lillian Annette Rowe Sanctuary, composed of 800 acres of Platte River

habitat. In addition, Audubon has worked with landowners to encourage their cooperation in maintaining the wildlife habitats on the Platte, such as by entering into leases for the seasonal protection of hundreds of acres.[2]

Audubon's concerns with the environmental quality of the Platte and with the prevention of harm to wildlife led Audubon to file a lawsuit a decade ago against the Rural Electrification Administration, seeking to enjoin construction of the Grayrocks Reservoir on the grounds of noncompliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 ("NEPA"), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 ("ESA" or "Act"). These claims related to the potential adverse effects of reductions in the flow of the Platte River on bird populations. The Audubon suit was consolidated with a suit brought by Nebraska also challenging the construction, in part on the grounds that use of the reservoir would violate this Court's decree in *Nebraska v. Wyoming*, *supra*. The district court found that the federal government had not satisfied its obligations under NEPA and the ESA and enjoined construction. *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978). While this decision was pending on appeal, the parties entered into a settlement that among other things addressed the ESA claims by providing that a certain quantity of water would be released from the reservoir for purposes of contributing to the flow to the Platte.

As the district court's decision in *Nebraska v. Rural Electrification Administration* shows, further decreases or regulation of the natural flow of the North Platte River raise significant questions under the ESA. This proceeding likewise implicates a number of distinct federal interests under the Act, a statute that represents

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[2] Audubon is also a participant in the Platte River Management Joint Study, along with federal and state agencies.

Congress's efforts to design measures "to restore species that are so depleted in numbers that they are in danger of, or threatened with, extinction." H. R. Rep. No. 567, 97th Cong., 2nd Sess. 10 (1982).[3] Substantively, the ESA is intended to guarantee that federal actions are conducted to the greatest extent possible in a manner that protects endangered or threatened species. 16 U.S.C. § 1536. Section 1536(a)(2) states in relevant part that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the habitat of such species . . . , unless such agency has been granted an exemption for such action." Section 1536 goes on to provide a mechanism for this jeopardy assessment and a process for seeking an exemption from the requirement of not acting in a way that may jeopardize an endangered or threatened species. *Id.* § 1536(b)-(j), (o). The criteria for exemption include both the availability of "reasonable and prudent alternatives to the agency action" and the balance between the benefits of the agency action and the benefits of "alternative courses of action." *Id.* § 1536(h)(1)(A).

Section 1538 sets out a more general prohibition on conduct that adversely affects endangered or threatened species. It prohibits "any person subject to the jurisdiction of the United States" from "taking"—harassing or harming—a protected species. *Id.* § 1538(a)(1)(B). Under regulations promulgated pursuant to the Act, "harass" has been defined as "an intentional or negligent

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[3] Congress stated that "[the] purpose [of this chapter is] to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). This Court in *TVA v. Hill*, 473 U.S. 153, 180 (1978), called the Act "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."

act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Likewise, "harm" has been defined as "an act which actually kills or injured wildlife" including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Ibid.* Again, the ESA goes on to provide a mechanism for exemption from this prohibition, which includes consideration of alternative actions and the practical extent of minimizing the harm. 16 U.S.C. § 1539(a)(2)(A), (B).

Congress has also made clear that private parties, such as Audubon, have the right to assert these federal interests. While ESA's protective measures expressly cover only species listed by federal authorities as endangered or threatened,[4] the statute gives Audubon a right to challenge the failure to list a species that faces a threat to its continued existence. *Id.* §§ 1533(a), 1540(g)(6). It also authorizes judicial review of an exemption decision under section 1536. *Id.* § 1536(n). Finally, and most significantly, it confers authority on Audubon to enforce its prohibitions by giving Audubon a cause of action "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." *Id.* § 1540(g)(1)(A). In short, as this Court wrote in *TVA v. Hill*, 437 U.S. 153, 181 (1978), "[c]itizen involvement was encouraged by the Act."

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[4] The statute also provides for the designation of critical habitats for certain endangered or threatened species. 16 U.S.C. § 1533(a)(3).

The federal interests recognized by the ESA become relevant to this proceeding in light of the potential adverse effects of this Court's apportionment decision on the endangered species that use the Platte. For example, it is essential for the habitat of the Whooping Crane [5] that the flow of the Platte be sufficient between March and April—and again in the Fall—to maintain a river that allows the Cranes to roost. Moreover, there need be periodic scouring and flooding flows that maintain a wide, shallow channel in the river and help clear the vegetation that could otherwise create unsuitable habitats for the Cranes. The Least Tern and the Piping Plover need sand bars in the river channel during the summer to nest, and also an adequate flow to protect the sand bars from predators. Any decision by this Court that authorizes severe reductions in current flows or fails to guarantee that flows are scheduled to provide for conditions needed by these endangered species would certainly raise significant concerns under the Act.[6] In sum, this proceeding closely relates to Audubon's interests under federal law.

**B. This Proceeding's Effect on Audubon's Interests**

Our position is that intervention is appropriate because the proceeding in this Court may impair Audubon's ability to enforce the provisions of the Endangered Species Act in three ways. First, denying Audubon the ability to intervene will prevent the organization from asserting

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[5] A section of the Platte has been designated as a "critical habitat" for the Whooping Crane. 50 C.F.R. § 17.95.

[6] While the Sandhill Crane is not currently listed as a threatened endangered species, further degradation of the Platte raises serious concerns for these birds as well, because 80% of world's Sandhill Cranes rely on the Platte as a staging area in March and early April. Further crowding of the Sandhill Cranes on the Platte could make them more susceptible to disease, natural predators, or adverse weather conditions, and might result in wiping out specific races of the species.

its rights under the ESA to challenge the positions taken by the federal government in this proceeding.[7] The statute, in essence, not only regulates the federal government's conduct in the field concerning water policy, but also certain conduct in this litigation. Specifically, section 1536(a)(2) clearly places an obligation on the United States *as a party to this proceeding* "to insure that [its actions are] not likely to jeopardize the continued existence of any endangered species." By extension the ESA gives Audubon the right to assure that when the United States presents positions to this Court, such positions are based on assessments about the impact of those actions on endangered species. Obviously, Audubon's federal law rights to challenge the conduct of the federal government during the proceeding will be entirely lost if Audubon is not permitted to intervene.

Second, it is unlikely that either the federal government or a lower court will look beyond any water appropriation decision by this Court. Specifically, a claim by Audubon seeking to guarantee federal compliance with section 1536 will probably be rejected in favor of implementation of this Court's decision. For example, if this Court were to hold that Wyoming is entitled to certain amounts of the natural flow of the North Platte and can store that water at the Deer Creek Project, it will be very difficult to convince a district court that federal implementation of this Court's decision should be halted, and that the

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[7] It is essential to recognize that federal agencies have a pervasive and significant role in the management and allocation of water in the Platte River basin. For example, the Army Corps of Engineers must grant permits for the construction of almost any reservoir or canal used to direct water from the North Platte. The Bureau of Reclamation constructs, manages and maintains many of the reservoirs along the North Platte. The Federal Energy Regulatory Commission licenses the use of hydroelectrical power plants at a number of those reservoirs. And the Rural Electrification Administration provides financial assistance for the construction of such power plants. In short, water policy for the North Platte is entwined with federal action.

federal government should consider whether to modify the effect of this Court's decision because of the possibility of jeopardy to an endangered species.[8]

The Court's decision will similarly impair Audubon's ability subsequently to assert claims under section 1538 that implementation of the Court's decision will harm an endangered species. If the Court has apportioned Wyoming a certain amount of water from the North Platte, it may be impossible as a practical matter to convince a lower court to prevent enforcement of this Court's decree because Wyoming's use of water would harm Whooping Cranes in Nebraska. In other words it is entirely reasonable to fear that any ESA claim by Audubon aimed at altering the effect this Court's decree will not be considered because no court or federal agency will assert the power to so alter rights under the decree.[9]

Third, the Court's apportionment decision will make it easier for federal or state agencies to seek exemptions from the Act's coverage. As noted above, the bases for exemptions from ESA coverage include consideration of the factual context of the agency action—such as whether there are reasonable alternatives to the action adversely affecting the endangered species. 16 U.S.C. §§ 1536(h), 1539(a). And decisions about what water will flow from the North Platte into Nebraska and on to the

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[8] Audubon's argument in favor of intervention is bolstered by its interest in protecting its rights against the federal government under the settlement agreement in the Greyrocks litigation. Specifically, it would want to: 1) guarantee that the federal government does not take a position inconsistent with the agreement and 2) argue that this Court should not authorize the federal government to act in violation of the agreement.

[9] If this Court decides to consider the relationship between apportionment and wildlife concerns, its decision will be definitive not only as a practical matter but also as a legal matter, under principles of stare decisis.

Platte will alter the calculus for determining whether exemptions should be granted from the jeopardy assessments requirement and harm prohibition. Put simply, a decision by the Court to apportion more water to Wyoming or the failure properly to schedule the remaining flow will make it much easier for Nebraska to seek an exemption from the prohibition against harming the endangered species relying on the Platte.[10]

**C. Audubon's Interests May Not Be Adequately Represented**

Finally, Audubon's interests are distinct from those of the other parties in this proceeding. It is not asserting an interest merely as a part of a class of other citizens of one of the states in the proceeding—as did the City of Philadelphia in *New Jersey v. New York*; it is asserting its rights under federal law. Nor are these federal law rights properly represented by the United States. The United States is representing federal agencies, such as the Army Corps of Engineers and the Bureau of Reclamation, that have interests distinct from and possibly adverse to those interests protected by the ESA. *See, e.g., TVA v. Hill, supra*; *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39 (1972).[11] Furthermore, the ESA itself contemplates the necessity of compliance oversight by private parties, such as Audubon.[12]

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[10] Although it is too early to describe precisely Audubon's contemplated role in this proceeding, at a minimum Audubon will seek to establish for the Court minimum water flows and release schedules essential for maintaining the habitats of the endangered bird populations.

[11] In any event, the United States in its initial filing in this proceeding gave no indication that it intended to litigate ESA issues here.

[12] Audubon's intervention is also supported by reference to the standards for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. While the requirements of Rule 24 do not govern the Court's intervention decision here, *Arizona v. California*, 460 U.S. 605 (1983), reference to those requirements

In sum, much like the pipeline companies in *Maryland v. Louisiana*, *supra*, Audubon has a "direct stake in [the] controversy" before the Court and, further, its participation would lead to "a full exposition of the issues" involved. The latter is particularly significant in light of Audubon's long-standing interest in and study of the endangered species that rely on the Platte. Indeed, Audubon has a particularized interest in the bird habitat on the Platte in that it owns a bird sanctuary maintained for the purposes of wildlife preservation and study. The organization's expertise in these important wildlife resource issues is certain to assist the Court in its consideration of the impact of the Endangered Species Act. Because of this expertise, if the Court were to hold that intervention is inappropriate, Audubon would request permission to assist the Court concerning wildlife issues as litigating amicus curiae. *See, e.g., Wyatt v. Stickney*, 344 F. Supp. 373, 375 & n.3 (M.D. Ala. 1972) (allowing several interested parties to participate as litigating amici), *modified*, 503 F.2d 1305 (5th Cir. 1974).

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bolsters our position. Under the federal rules, intervention as of right requires a three-part showing: (1) that Audubon "claim an interest relating to the property or transaction which is the subject of the action" (2) that Audubon "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest"; and (3) that Audubon's "interest is [not] adequately represented by existing parties." As described above, each of these three requirements is satisfied here.

## CONCLUSION

For the reasons stated above, Audubon's motion to intervene should be granted.

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